REPORT

OF THE

COMMITTEE ON COMMERCE

ON THE JOINT RESOLUTION (S. 4) IN RELATION TO THE FREE NAVIGATION OF THE MISSISSIPPI RIVER.

The Committee on Commerce to whom were referred the joint resolution in relation to the free navigation of the Mississippi river, respectfully submit the following report:

The rules of international law governing the rights of the parties, in relation to the navigation of the Mississippi river, rising as it does, in the United States and flowing through the Confederate States, and finally emptying into the Gulf of Mexico, are too clearly defined and laid down to admit of controversy or doubt.

Wheaton, in his Elements of International Law, page 252, says: "Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using those elements in any manner, which does not occasion loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation, over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the best writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can

only be effectually secured by mutual convention regulating the mode of its exercise.

"It seems that this right draws after it the incidental right of using all the means necessary to the secure enjoyment of the principal right itself. Thus, the Roman law which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water; and that the right to navigate a river involved the right to moor vessels to its banks to lade and unlade cargoes, &c. The public jurists apply this principle of the Roman law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted.

"The incidental right, like the principal right itself, is imperfect in its nature, and the mutual convenience of both parties must be consulted in its exercise."

These rules have received the assent of all civilized nations, and in all conflicts which have prevailed between States, in possession of different parts of a navigable river, in regard to the right of navigating the same, they have been invoked, and have controlled the final determination of the controversy; and have governed treaty stipulations so as to secure the full enjoyment of the rights recognized by them. The controversies between European States growing out of the claims to navigate the various rivers running through two or more States, furnish many notable examples. But without enumerating those examples, the Mississippi river itself, in the controversy between Spain and the United States has furnished an illustration.

When Spain had become the sole proprietor of both banks of that river from its mouth to a considerable distance up, and of the western bank to its source, she set up the claim to the exclusive right of navigation from the southern boundary of the United States to the mouth of the river. The United States holding the eastern bank of the river, and all the tributaries flowing into it from that side, north of the Spanish boundary, resisted the claim set up by Spain, and insisted upon the right to participate in the navigation of the river from its source to the sea. This counter claim was based upon treaty stipulations, as well as upon the law of nature and nations. The right was finally conceded by Spain in the treaty of San Lorenzo el Real, and the navigation of the whole river from its source to the sea was declared free to the citizens of the United States.

The argument in favor of the right of the United States to participate with Spain in the free navigation of the Mississippi river, is thus stated by Wheaton in his Elements of International Law, page 258: "The right was rested by the American Government on the sentiment written in deep characters, on the heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This natural right was found to be universally acknowledged and protected in all tracts of country united under the same political society, by laying the navigable rivers open to all the inhabitants. When these rivers enter the limits of another society, if the right of the upper in-

habitants to descend the stream was in any case obstructed it was an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The then recent case of the attempt of the Emperor Joseph II. to open the navigation of the Scheldt from Antwerp to the sea was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties and not of natural right.

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"If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that even if the river, where it passes between Florida and Louisiana, were the exclusive right of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would, indeed, be what those writers call an *imperfect right*, because the modification of its exercise depends, in a considerable degree, on the convenience of the nation through which they were to pass. But it was still a right, as real as any other right, however well defined; and were it to be refused, or to be so shackled by regulations not necessary for the peace or safety of the inhabitants as to render its use impracticable to us, it would then be an injury, of which we would be entitled to demand redress. The right of the upper inhabitants to use this navigation was the counterpart to that of those possessing the shores below and founded in the same natural relations with the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate.

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"It was a principle that the right to a thing gives the right to the means, without which it could not be used. That is to say, that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in case of distress or for other necessary purposes, &c. This principle was founded in natural reason was evidenced by the common sense of mankind, and declared by the writers before quoted."

We fully concur in the argument of the United States with Great Britain in support of their claim to the navigation of the St. Lawrence, that "the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of European rivers, was not sufficient to prove that the origin of the right was conventional and not natural. It often happened to be highly inconvenient, if not sometimes indispensable, to avoid controversies to prescribe rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean,

itself, in many instances, principally incident to a state of war, is subjected by innumerable treaties to various regulations. These regulations—the transactions of Vienna and other analogous stipulations—should be regarded only as the spontaneous homage of man, to the paramount Lawgiver of the Universe, by delivering His great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected."

The people of the Confederate States, while they are resolved to resist wrong to the last extremity, and at the risk of all that can make life desirable, with life itself, are anxiously careful to avoid demanding anything that contravenes those principles of natural justice engraved upon the human breast, which have received the sanction of all civilized nations, and been adopted as rules for the determination of these rights, and the regulation of their intercourse with each other. Notwithstanding the feelings of vindictive resentment which may reasonably be supposed to have been engendered by a long course of insult and injury, followed by an unprovoked, cruel and relentless war, waged against them by the people of the United States for their subjugation and enslavement, the people of the Confederate States have at no time, assumed a position or declared a purpose which would justify the conclusion, or even the presumption, that in their future intercourse with the United States, or any State thereof, they would, in any particular, depart from the strict rules of right and justice, or the acknowledged principles of international law. On the contrary, we may cite their action upon the subject-mattter under consideration, as evidence of this truth.

The sovereign conventions of the States of Alabama, Mississippi and Louisiana, after adopting their several ordinances of secession, respectively, passed resolutions declaring the free navigation of the Mississippi river, and the Provisional Congress, representing the sovereign States, by whom they were sent to organize a government for this Confederacy, by law, approved on the 25th February, 1861, enacted "that the peaceful navigation of the Mississippi river, is hereby declared free to the citizens of any of the States upon its borders, or upon the borders of its navigable tributaries."

We have thus taken the pains to show that whatever pretexts may be alleged by the people of the United States, as a justification or excuse for the unjust war they are waging against us, the denial, on our part, of their right to the free navigation of the Mississippi river, is not justly one of them.

But, were the principles of international law applicable to the case, doubtful or obscure, self-interest, the controller of the actions of men and of nations, would nevertheless prompt the people of the Confederate States to concede the right of free navigation of the Mississippi to the States on its upper waters and tributaries. The States of Ohio, Indiana, Illinois, Wisconsin, Iowa and Minnesota, have a territory of over three hundred thousand square miles, inhabited by ten millions of people; the lands are exceedingly, productive in breadstuffs, live stock, etc. While the Mississippi river is the natural outlet to the sea for all the products of those States, the States of the

Confederacy on that river, with a diverse soil and climate, and a population employed in the production and growth of the great staples, cotton and sugar, afford the natural market for the products of the States enumerated. Before it was interrupted, to the detriment of both sections, by the unnatural war now being waged against us, the mutuality of interest and dependence between those two sections had generated a commerce more extensive than that of the United States with the balance of the world. The Mississippi, with all its tributaries, was pregnant with life and commercial activity. Vessels to the value of millions, employing thousands of persons in their navigation, were engaged in the transportation of the products of the two sections, to the mutual advantage and prosperity of the people of each.

When peace shall return, except by subjugation; when the States of this Confederacy shall be depopulated and the land made a desert-waste; when peace shall return as it only will, with the independence of these Confederate States acknowledged regardless of the exasperated and vindictive feeling produced by the war, commerce, the great pacificator of nations, will be restored between the sections of the Mississippi valley. The same diversity of soil, climate, pursuit and production will continue to exist between them; begetting the same mutual dependence, and the same mutual interchange of commodities will again be resumed, renewing commercial life and activity upon the bosom of the great father of waters. This mutual interest will demand that the navigation of the Mississippi and tributaries, shall be free to the people of the States on their banks, regardless of the rules of natural or international law.

A denial of the principles above set forth, always produces controversies between States mutually interested in the navigation of a river flowing through their territories. Controversy has always ceased, and peace has resulted upon their acknowledgment. Since the question growing out of the navigation of the great rivers of Europe, as well as of the St. Lawrence, have been settled upon their basis, no controversies have arisen between the States interested. The same rules applied to the Mississippi river, will, it is confidently believed, result in the same manner, and operate as a bond of peace, and to the mutual advantage of the States, and people interested in the commerce and navigation of that river.

The committee, therefore, report the accompanying preamble and resolution as a substitute for that referred to them.

Hollinger Corp.
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